

Saber-rattling in space

How international law does (not) regulate States' plans for Space Forces

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Does international law entitle states to have military space forces? Recent efforts by several states as well as NATO to strengthen their military space capabilities re-ignite this debate. The issue is not unregulated; international space law in particular is not silent on this issue. But the limits are not as strict as one might think.

Renewed military interest in space

At its 70th anniversary summit in London in December 2019, NATO [declared](#) space its fifth operational domain. This decision is the latest in a series of national decisions, which started with the [announcement](#) by US president Trump of his plans to establish an independent novel service branch of the US armed forces. This "Space Force" would be dedicated to comprehensively supervising and/or conducting all US military space operations. Implementing the plan, president Trump issued [Space Policy Directive 4](#) in February 2019, which established a US Unified Space Command under the Department of the Air Force in August 2019. [France](#), as well as [Russia and China](#) have also shown increasing ambition to engage in military space activities.

What we know so far about the various space force proposals

The abovementioned US Space Policy Directive 4 lays out some principles of the future US Space Force. The characteristics of the US endeavor become particularly clear in section 4 on the scope of its competencies. Its *litera* (a) states that a legislative proposal for the Space Force should *inter alia*:

„consolidate existing forces and authorities for military space activities, as appropriate, in order to minimize duplication of effort and eliminate bureaucratic inefficiencies“ [...]

This appears to be the crucial principle of the idea of a US space force: it reorganizes and ties together several – currently decentralized – branches of the US military that are now still conducting separate space activities, as when they were founded in the late 1950s.

[NATO](#) stated that their goal is merely to protect member states' assets in orbit, not weaponizing space. Notably, [France](#) was the only state to announce its intention to develop and deploy Anti-satellite (ASAT) weapons to protect its interests in orbit.

Does international law regulate the establishment of armed forces?

The International Court Justice made a clear pronouncement in its 1986 [Nicaragua judgement](#), when it stated that “in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited”. The questions thus is whether general international law and particularly the [Charter of the United Nations](#) (UNC) prohibits States to establish armed forces. Although international law today outlaws declared war and the use of military force against states (Art. 2(4) UNC), there are still exceptions to these rules. These exceptions, notably the “inherent right to self-defence” (Art. 51 UNC), indicate that the UNC does not *per se* outlaw the establishment and possession of military forces by states, as otherwise the right to self-defense would be moot. Furthermore, regarding military measures authorized by the United Nations Security Council (UNSC) pursuant to Chapter VII, the UNC presumes the possession of armed forces by states, as Art 43 UNC requires states to make armed forces available to the UNSC for carrying out its decisions under Chapter VII. But there have been approaches to limit the placement of armaments geographically and the testing of certain weapons in international law. Thus, we will analyze any specific limitations concerning outer space.

Does space law restrict the establishment of space forces and their use?

There is a vast amount of political and programmatic statements in many UN documents (e.g. [here](#)) and the preambles of all five UN Space Treaties. But there are only three legally binding operative treaty provisions, which explicitly address aspects of the military uses of outer space.

The 1967 [Outer Space Treaty](#) (OST) establishes the cornerstones of space law. It also deals with military uses of outer space. Art. III OST requires that states conduct all their activities in outer space in accordance with international law, including the UNC. Thereby, *inter alia*, it answers the question, whether general international law and the UNC apply to space activities. Art. IV OST contains specific restrictions on armaments and the use of force beyond general international law:

1. States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

2. The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. [...]

First, Art. IV para 1 OST prohibits the testing, keeping or utilizing WMDs in outer space – reinforcing the clear prohibition of nuclear tests or any other nuclear explosion in outer space contained in the 1963 [Limited Nuclear Test Ban Treaty](#) (Art. I para 1). The only longstanding exception, agreed upon in practice, are intercontinental ballistic missiles carrying nuclear warheads completing a partial orbit during their parabolic flight. (see e.g. [here](#)) What the provision however does not

limit, is placement and use of conventional weapons, or truly all kinds of weapons not considered WMDs, in outer space.

Second, the second paragraph of Art. IV OST was more controversial. Its first sentence obliges states parties to use the Moon and other celestial bodies *exclusively for peaceful purposes*. From the very beginning the term ‘peaceful purposes’ has been debated in academia as well as among states. Opinions were divided whether peaceful in this context means non-military (as argued by the USSR at the time of drafting, but not maintained anymore to the same extent by the [Russian Federation](#)) or indeed non-aggressive in the sense of compliant with the UNC rules on the use of force (as maintained mainly by the US and others, see [here](#)). This difference is crucial: outer space and particularly space-based applications such as navigation, communication and Earth observation have been used to support military operations and reconnaissance since the very beginning of the space age. The Soviet reading would prohibit such use, while the US would not. Moreover, for the military space activities currently envisioned, Art. IV para 2 OST is only of limited relevance, as its scope is confined to the Moon and other celestial bodies. It does not apply to space activities in orbit around Earth or the outer space void, i.e. the empty space “between” celestial bodies.

Third, Art. 3 of the 1979 [Moon Agreement](#) not only repeats Art IV Outer Space Treaty, but also goes further in prohibiting any threat or use of force or any other hostile act on or in use of the Moon and other celestial bodies. Its impact however is limited, as the treaty only achieved 18 ratifications (as of January 2019).

Thus, international space law does not generally prohibit placing and using weapons – with the exception of WMDs – in orbit or in the outer space void. Recent efforts of several states (notably Russia and China) to conclude a treaty on the prevention of an arms race in outer space ([PAROS draft treaty](#)), further emphasize this conclusion. But for now, “space war” is generally legally possible. If not prohibited by one of the norms mentioned above, the way and manner in which weapons may be used in outer space is hence only subject to the *ius ad bellum* and *ius in bello* and also the rules of Art IX OST on environmental protection, due regard and consultation.

Should we wait for States to act?

As of now, despite the somewhat aggressive political rhetoric, the nature of the US Space Force may only be administratively consolidating. But it also reminds of the importance of space law. There are specific prohibitions of certain weapons. But international law does not proscribe States to create or possess armed space forces. It does not restrict states in their decisions on how to structure them. And it does not prohibit States to deploy and use conventional weapons in the Earth orbit or the outer space void.

It remains to be seen what the actual operations and tasks of a US Space Force and other similar projects will look like. Only then can one properly assess their compatibility with international law. Whether or not we want to wait until then is another question. But there is enough reason to think about space law already

now. And why not consider political efforts to develop the law, and to encourage disarmament and the prevention of an arms race in outer space?

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